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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 517

BROOKS TRANSPORTATION COMPANY, INCORPORATED, A B & C MOTOR TRANSPORTATION COMPANY, INC., M & M TRANSPORTATION COMPANY, ET AL., *Appellants,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SCHENLEY INDUSTRIES, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

STATEMENT OF SCHENLEY INDUSTRIES, INC., OPPOSING JURISDICTION AND MOTION TO AFFIRM.

CHARLES PICKETT,
Counsel for Appellee, Schenley Industries, Inc.

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED, ET AL.,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SCHENLEY INDUSTRIES, INC., ET AL.,

Defendants-Appellees.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO AFFIRM.

(Filed January 3, 1950)

Appellee, Schenley Industries, Inc., (hereinafter called "Schenley"), pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court of the United States, submits the following statement in opposition to appellants' statement of jurisdiction, and moves that the final judgment and decree of the District Court be affirmed.

I. The Issue

The case involves Part II of the Interstate Commerce Act (49 U.S.C. § 301 *ff.*), familiarly known as the Motor Carrier Act, which we shall call "the Act."

The statutes and the undisputed facts appear from the opinion below and the motion of other appellees, and will not be repeated here.

The basic issue is this:

> When a concern primarily engaged in a non-trucking business (in Schenley's case, the distribution of alcoholic beverages) uses its own vehicles to deliver goods to its customers, at a delivered price, is it a "private carrier" under the Act?

The Interstate Commerce Commission (51 M.C.C. 65) and the District Court (93 F. Supp. 517) answered that question "yes." That conclusion is so plainly correct that the appeal presents no substantial question for this Court to review.

II. The Act's Legislative History Confirms the Soundness of the "Primary Business" Test

(To avoid duplication, we shall not mention those parts of the legislative history quoted by the District Court and in the motion of the other appellees.)

1. Referring to the Act, this Court said: "The recognized practices of an industry give life to the dead words of a statute dealing with it." *United States* v. *Mather*, 307 U.S. 148, 155 (1939).

The Act embodied a recognized distinction in the industry between two broad groups of motor vehicle operators.

The first group comprised for-hire carriers (now "common" or "contract" carriers), whose business was the sale of transportation service. They might haul liquor or lumber, but they did not sell it. They were not interested in the cargo carried, except as a means of earning trucking charges. To them, transportation was an end in itself.

Second were the self-truckers (now "private" carriers),

whose business was the sale of goods. They were vitally interested in the cargo carried. Of course they performed the same activity as for-hire carriers, and of course they expected to recoup their trucking expense from their customers. But to them transportation was only a means to an end—the promotion of their primary commercial enterprise.

This distinction was noted as far back as *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, 705-706 (1928):

> "Truck operations fall into one of three general classes: (1) Where the truck is owned by the operator and is used in the transportation of his own goods or products and in the conduct of his business—*the owner-operated truck;* (2) the so-called *contract carrier*, who enters into special agreements for transportation with one or more shippers, but does not hold himself out to haul for the public generally; (3) the *common-carrier* truck, which (*a*) operates on schedule over a regular route or between fixed termini, and usually at published rates, from which it may not depart, and (*b*) the so-called anywhere-for-hire carrier.
>
> "In the first class are the trucks owned and operated by manufacturers, merchants, jobbers, farmers, and others in the conduct of their business. There is no suggestion from any source that motor trucks of this class engaged in the transportation of interstate commerce should be placed under Federal regulation."[1]

A similar analysis appears in the report of Commissioner Eastman, as Federal Coordinator of Transportation, accompanying the bill which ripened into the Act. *Regulation of Transportation Agencies*, S. Doc. 153, 73d Cong., 2d Sess. (1934), pp. 172-173.

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[1] Italics in this quotation were the Commission's. Hereafter all italics are ours unless otherwise stated.

The definition of "private carrier" in that bill was practically identical with the present definition.[2]

2. As Commissioner Eastman pointed out, the "proposed bill provides no specific regulation of the private carrier," *ibid.*, p. 23, note 28, and "contains no 'commodities clause' or prohibition against the transportation by a motor carrier of its own property," *ibid.*, p. 49.

Congress agreed that private carriers should not be regulated, except as to safety matters. That decision was not based on some naive illusion that private carriers furnished gratis transportation. Necessarily every business man delivering goods in his own vehicles must shift his trucking expense to his customers, or eventually he will go bankrupt. As one witness put it during the hearings on the bill, "the ultimate price of a commodity to the buyer must have cost of transportation included in it." *Hearings before the Senate Committee on Interstate Commerce,* 74th Cong., 1st Sess., on S. 1629 (Feb. 25 to Mar. 6, 1935), p. 301.[3]

The decision not to regulate private carriers was based on completely pragmatic reasons. Private carriers were very numerous.[4] Their regulation would have revolution-

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[2] It appeared in § 325 of the proposed bill (*Regulation of Transportation Agencies,* p. 370):

> "The term 'private carrier of property by motor vehicle' shall mean any person not included in the terms 'common carrier by motor vehicle', or 'contract carrier by motor vehicle' as defined in this part, who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent or bailment, or in furtherance of any commercial enterprise."

[3] This reference is hereinafter cited as *"Hearings."*

[4] Commissioner Eastman testified that "out of the total of what we call intercity movement of goods by major truck, we estimated that probably as much as half is performed at the present time by private carriers, in other words, by industries or persons which own or lease their own motor vehicles." *Hearings,* pp. 62-63. Indeed, the commercial truckers argued that because the bill would not regulate "the owner-operated trucks haul-

ized business practice and imposed a terrific burden on the Commission. Regulation of their "rates" would have been impracticable.[5] And it was felt that they would furnish a useful check on commercial truckers (*Regulation of Transportation Agencies*, pp. 33-34), in view of "the natural tendency of business to flow from for-hire trucks to shipper-owned trucks" when the former charged exorbitant rates (*Hearings*, p. 368).

3. The basic line of demarcation between regulated ("common" and "contract") carriers and unregulated ("private") carriers was to be the "primary" or "principal" business of the vehicle operator.

Commissioner Eastman said in his report (*Regulation of Transportation Agencies*, p. 194):

> "Even when contract carriers have been included within the scope of regulation, troublesome difficulties have arisen from various schemes and devices used to circumvent the law. These have generally consisted of the leasing or pretended sale of equipment to shippers, or of fictitious sales to the carrier of the property transported, thus giving to the transportation the color of private carriage. 'Corporations' composed of shipper and carrier 'stockholders' have been formed for the same purpose, and extensive 'peddling' *operations have been engaged in by persons whose primary business is that of motor transportation.* These and other evasions of the laws which have made enforcement difficult and partially ineffective, as well as the conclusion that bona fide private carriers should be subjected to

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ing the goods of their owners and comprising a very large percentage of the total number of trucks used," the "imposition of any burdensome restrictions upon motor vehicles for hire as distinguished from vehicles hauling freight of their owners would not be in the public interest." *Hearings*, p. 96.

[5] *Hearings*, pp. 62-63, 86, 347. Manifestly the amount charged the customer for the transportation could not be regulated satisfactorily without also controlling the amount charged for the goods. *Cf. Stephenson* v. *Binford*, 287 U. S. 251, 278 (1932).

reasonable regulation, have led eight States to adopt laws covering the private carrier."

Even the opponents of the bill recognized the "primary" or "principal" business test. One witness testified (*Hearings*, p. 330):

> "It has already been shown that over 85 percent of the vehicles operated in this country are operated by those classed as private carriers in this bill. In other words, they *are operated by those whose principal business is not the transportation of property for compensation.*"

4. No shred of evidence supports appellant's assertion that there was a "legislative intent not to classify as private carriers those who receive recompense for transportation of property which they own, etc., or in furtherance of any commercial enterprise . . ."

In fact, the very silence of the "private carrier" definition on the subject of "compensation" shows that, when "such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise," it is private carriage whether "for compensation" or not.

Moreover, the Act itself shows that the distinguishing feature between regulated and unregulated transportation is not the presence or absence of "compensation."

Section 203(b)(9) of the Act (49 U. S. C. § 303(b)(9)) excludes from regulation "the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce *for compensation* by any person not engaged in transportation by motor vehicle *as a regular occupation or business* . . ."

Plainly, therefore, the crucial fact is not whether "compensation" is received, but whether the transportation is conducted "as a regular occupation or business" or merely

as ancillary to a non-transportation business—which is exactly what the decision below holds.

Indeed, the following colloquy makes it plain that the phrase "for compensation" in the "common" and "contract" carrier definitions was intended solely to exclude from the Act those rather exceptional carriers who act gratuitously (*Hearings*, p. 59):

> "The Chairman. Mr. Eastman, if you take contract carriers, just simply as a general word, in the terms you have outlined there, it would simply give you power to regulate a person who carried somebody across the State line *without charge*, unless you had some *limiting words* in there, would it not?
>
> "Mr. Eastman. *In the definition the words 'for hire' are used.*"[6]

5. Of course the legislative history may properly be considered. It is sufficient to mention *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534 (1940), construing this very Act (pp. 543-544):

> "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

III. The "Primary Business" Test Has Been Applied by the Commission from the Outset

In scores of decisions, the Commission has uniformly followed the "primary business" test, first enunciated in an early case in which Commissioner Eastman participated.

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[6] Incidentally, no better proof exists to show that appellants' supposed "distinction between compensation and hire" is non-existent. The two terms always have been used interchangeably in this field. See, *e.g.*, Mr. Justice Story in *Citizens' Bank* v. *Nantucket Steamboat Co.*, Fed. Cas. #2,730, 5 Fed. Cas., at p. 725 (1811). Although the definition actually used the term "for compensation," Commissioner Eastman inadvertently used the more customary term "for hire."

Carpenter Common Carrier Application, 2 M. C. C. 85, 87 (1937).

Of course a delivered price always contains a charge for the transportation. But uniformly the Commission has held that a concern primarily engaged in a non-trucking enterprise is a private carrier when it sells on a delivered price basis, and trucks the goods itself.

That is true when the transportation charge is buried, more or less deeply, in a uniform delivered price.[7]

That is true when the transportation charge is readily identifiable, even though it is not stated separately, *e. g.*, when the delivered price varies with the distance.[8]

It is true even though the transportation charge is stated separately, so that the customer is quoted "a price" for

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[7] See, *e.g., Levine Contract Carrier Application*, 6 M.C.C. 4, 5 (1939); *Brozdowski Common Carrier Application*, 24 M.C.C. 484, 485 (1940); *Monark Egg Corp. Contract Carrier Application*, 26 M.C.C. 615 (1940); *Southern Utah Produce Co. Common Carrier Application*, 29 M.C.C. 767, 769 (1941); *Dull Contract Carrier Application*, 32 M.C.C. 158, 159-160 (1942); *Dodd Common Carrier Application*, 34 M.C.C. 705-707 (1942); *Marcellus Contract Carrier Application*, 43 M.C.C. 128, 129-130 (1944).

Similarly, a person primarily acting as commission agent or a contractor is a private carrier although his compensation includes an unstated amount for trucking the goods. See, *e.g., Whites Garage & Service Station Common Carrier Application*, 7 M.C.C. 453, 454 (1938); *Howrigan Contract Carrier Application*, 11 M.C.C. 455, 456 (1939); *Swanson Contract Carrier Application*, 12 M.C.C. 516, 519-520 (1939); *Economy Oil Company, Inc., Contract Carrier Application*, 13 M.C.C. 163, 164 (1938); *Teton Oil Company Contract Carrier Application*, 14 M.C.C. 440, 442 (1939); *Trohn's Supplies, Inc., Common Carrier Application*, 20 M.C.C. 127, 128 (1939); *Monk Contract Carrier Application*, 20 M.C.C. 115 (1939); *Brown & Root, Inc., Contract Carrier Application*, 24 M.C.C. 47 (1940); *Wakefield Contract Carrier Application*, 27 M.C.C. 671, 672-673 (1941); *Williams Bros. Corp. Contract Carrier Application*, 44 M.C.C. 557, 566-567 (1945).

[8] See, *e.g., Congoleum-Nairn, Inc. Contract Carrier Application*, 2 M.C.C. 237, 240 (1937); *D. L. Wartena, Inc., Common Carrier Application*, 4 M.C.C. 619, 623 (1938); *Swanson Contract Carrier Application*, 12 M.C.C. 516, 520 (1939); *Youngson Common Carrier Application*, 21 M.C.C. 625, 626 (1942); *Woitishek Common Carrier Application*, 42 M.C.C. 193, 205-206 (1943); *John S. Teeter & Sons, Inc., Common Carrier*

the goods plus an additional amount for the transportation.[9]

The court decisions, reviewed in the opinion below (93 F. Supp., at pp. 523-524), are to the same general effect.

The Commission has never approved appellants' "compensation" test or failed to apply the "primary business" test.

IV. The Commission's Settled Construction of the Act Has Been Approved by Congress

1. The Commission's unbroken construction is entitled "to especially significant weight in the interpretation of this Act," *Levinson* v. *Spector Motor Service,* 330 U. S. 649, 662 (1947).

"This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *United States* v. *American Trucking Assns., Inc.,* 310 U. S. 534, 549 (1940).[10]

2. But the significance of the Commission's decisions goes even deeper.

Application, 43 M.C.C. 200, 202 (1944); *Tyrrell's Inc., Common Carrier Application,* 44 M.C.C. 552, 555-556 (1945).

Similarly, a commission agent whose compensation includes a specified sum for trucking the goods is a private carrier. *Record & Glotfelty Contract Carrier Application,* 6 M.C.C. 481, 483 (1938); *Cyr Contract Carrier Application,* 17 M.C.C. 658, 660 (1939).

[9] See, *e.g., Murphy Common Carrier Application,* 21 M.C.C. 54, 55 (1939); *Spanlake Common Carrier Application,* 21 M.C.C. 258, 259 (1939); *Glosserman Chevrolet Co. Contract Carrier Application,* 27 M.C.C. 471, 472 (1941); *Katz Contract Carrier Application,* 46 M.C.C. 869 (1946).

[10] See also, *Noble* v. *United States,* 319 U. S. 88, 93, note 4 (1943); *Boutell* v. *Walling,* 327 U. S. 463, 471 (1946); *Hiatt* v. *Brown,* 339 U. S. 103, 109 (1950).

When the bills which eventually became the Transportation Act of 1940 (54 Stat. 898) were under consideration, the subject of private carriage was carefully reviewed. It was recognized that private carriers were not regulated by the existing Act. See, *e. g., Hearings before the House Committee on Interstate and Foreign Commerce,* 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862 (Jan. 24 to Mar. 30, 1939), pp. 230, 333-334, 1069-1070.

Hence the Commission was asked to report on "the extent to which control over interstate transportation of property other than by common or contract carriers would be practicable and desirable." *Ibid.*, p. 1557.

The Commission reported by a letter dated April 3, 1939, from Commissioner Eastman to Representative Lea, Chairman of the House Committee on Interstate and Foreign Commerce. After quoting the "private carrier" definition, the Commission said:

> "*In that connection, question has arisen as to whether an industrial establishment which delivers its products to customers by its own trucks is a 'private carrier of property', if the price which the customer pays for the products includes an increment to cover the cost of this transportation.* This question was considered by Division 5 of the Commission in *Congoleum-Nairn, Inc., Contract Carrier Application,* 2 M. C. C. 237, where a situation of that general character existed. It was there found that applicant was 'not engaged in the transportation of property' and that it was 'in no sense a carrier for hire in its motor-vehicle operations', since they were 'conducted by it as an integral part of its business of manufacturing and selling the commodities described.' *Applicant was held to be, 'in these motor-vehicle operations, incidental to its principal business, * * * a private carrier within the terms of the above definition.'* "[11]

[11] The letter is referred to in *Hearings before the Senate Committee on Interstate Commerce,* 76th Cong., 1st Sess., on S. 1310, etc. (Apr. 3 to

Thus the Commission's interpretation of the Act—the "primary" or "principal" business test—was expressly called to Congress' attention.

Congress rejected efforts to curtail private carriers' activities, including an attempt to prevent the very practice involved here—the inclusion, in delivered prices of goods transported by truck, of amounts based on rail freight rates. The details are given in the opinion below (93 F. Supp., at pp. 524-525) and the motion of other appellees, and need not be repeated here.

When Congress passed the Transportation Act of 1940, it reenacted the definitions without material change. It changed the wording, but not the meaning, of the "common carrier" and "contract carrier" definitions. *Thomson* v. *United States*, 321 U. S. 19, 24, note 2 (1944). Carefully it left the "private carrier" definition unchanged.

Thereby Congress in effect approved and codified into law the Commission's previous interpretation of those definitions—the "primary business" test and the decisions applying it. "Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law." *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 116, (1939).[12]

V. No Substantial Question Exists

Appellants' "compensation" test is derived solely by plucking certain words out of the Act and completely ignoring the rest of the statute.

14, 1939), pp. 765-766. The quotation is from page 6 of the Commission's file copy of the letter.

In the *Congoleum-Nairn* case, the delivered price exceeded the f.o.b. plant price by an amount based on the railroad carload freight rate. The situation was exactly comparable to Schenley's operations.

[12] See also, *Morgan* v. *Commissioner of Internal Revenue*, 309 U. S. 78, 81 (1940); *Crane* v. *Commissioner of Internal Revenue*, 331 U. S. 1, 7-8 (1947); *United States* v. *Wyoming*, 331 U. S. 440, 452-453 (1947); *United States* v. *Zazove*, 334 U. S. 602, 623-624 (1948).

That is not the way to construe the Act. Statutes must be construed as a whole. *Securities and Exchange Comm.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350-351 (1943); *Commissioner of Internal Revenue* v. *Wodehouse*, 337 U. S. 369, 379, 393 (1949); *Federal Power Comm.* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 514 (1949); *United States* v. *Alpers*, 338 U. S. 680, 684 (1950).

"To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation." *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 542-543 (1940).

The "compensation" test has no support in the Act or its legislative history. It is contrary to the decisions construing the Act. Appellants are really seeking to overrule a settled line of decisions and impose, by indirection, limitations on private carriage which Congress never desired and has refused to sanction.

We respectfully submit that no substantial question is presented by this appeal, and move that the judgment of the District Court be affirmed.

Dated: January 1, 1951, 25 Broadway, New York 4, N. Y.

(S.) CHARLES PICKETT,
Counsel for Defendant-Appellee,
Schenley Industries, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED; A. B. & C. MOTOR TRANSPORTATION COMPANY, INC., AND M. & M. TRANSPORTATION COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES

MOTION TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree, entered November 17, 1950,[1] by a district court of three judges specially constituted pursuant to Sections 2284 and 2325, Title 28 of the United States Code, dismissing appellants' complaint seeking to set aside orders of the Interstate Commerce Commission entered May 27, 1948, and June 21, 1948. Appeal was allowed on December 18, 1950, and the appeal papers were served on December 19, 1950.

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[1] The court rendered its opinion on October 9, 1950, reported 93 F. Supp. 517.

The order of May 27, 1948, was entered in the Commission proceeding entitled *Lenoir Chair Company Contract Carrier Application,* Docket No. MC-96541,[2] and the order of June 21, 1948, was entered in *Schenley Distillers Corporation Contract Carrier Application,* Docket No. MC-107079.[3]

Lenoir Chair Company, hereinafter referred to as Lenoir, filed its application with the Commission on March 25, 1946, for a permit authorizing continuance of operations as a contract carrier in interstate commerce of furniture of its own manufacture, as well as materials, supplies and machinery used in connection therewith, throughout a territory embracing points in 15 states and the District of Columbia.

Schenley Distillers Corporation, hereinafter referred to as Schenley, filed its application with the Commission on May 7, 1946, for a permit to operate in interstate commerce as a contract carrier of alcoholic liquors of its own manufacture, and materials and supplies used in their manufacture and sale throughout a territory including 14 states and the District of Columbia.

Each applicant alleged in its application that its motor vehicle operations were not those of a common or contract carrier but constituted private carriage, and that the purpose of filing such applications was to secure a determination by the Commission of the question of whether it was a common carrier,[4] or a con-

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[2] 48 M.C.C. 259.

[3] 48 M.C.C. 405.

[4] Sec. 203 (a) (14) defines Common Carrier as follows:

"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class of classes thereof for compensation, whether over regular or irregular routes, * * *."

tract carrier,[5] or a private carrier,[6] as those terms are used in Section 203 (a) subsections (14), (15) and (17) of the Interstate Commerce Act (Title 49 U.S.C., Section 203 (14), (15) and (17)). That this is a correct method of securing a determination of their status is settled by *Schenley Distillers Corp.* v. *United States,* 326 U.S. 432.

Following hearings before Commission examiners, Division 5 issued its report and order in the Lenoir proceeding on May 27, 1948, and in Schenley proceeding on June 21, 1948, holding neither concern is a common or contract carrier but is a private carrier and the application in each case was ordered dismissed.

Petitions, filed by protestants, including some of appellants herein, requesting reconsideration by the entire Commission, resulted in the proceedings being reopened for oral argument only, and inasmuch as the cases presented similar issues they were heard together. Both cases were disposed of in one report which contained a reaffirmation of Division 5's finding that both Lenoir and Schenley are not common carriers or contract carriers but are private carriers and that the applications should be dismissed.

The facts in the case are not in dispute and the only

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[5] Sec. 203 (a) (15) defines contract carrier as follows:

"The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

[6] Sec. 203 (a) (17) defines private carrier as follows:

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

question involved is whether the Commission erred in finding that Lenoir and Schenley are not common carriers as defined in Section 203 (a) (14), or contract carriers as defined in Section 203 (a) (15), but private carriers as that term is defined in Section 203 (a) (17) of the Act (49 U.S.C., Sec. 303 (a) (14), (15) and (17)).

In the report by Division 5 of May 27, 1948, it was found that Lenoir is primarily engaged in the manufacture of furniture for the purpose of sale and that of an annual production of approximately $3,000,000 only 15 or 20 percent of the manufactured product is transported in its own trucks from the factory to its customers in various states, while the remainder is transported by rail and motor common carriers. Lenoir operates 5 trucks for this purpose. These vehicles also are used, whenever possible on return trips, for carrying supplies and materials used in the manufacture of the furniture. Sales are made f.o.b. factory, and when delivered in the company's trucks Lenoir adds to the factory price a charge comparable to rail or motor carrier rates, and shows this charge separately on the invoice. This charge, although not sufficient to cover the actual cost of transportation, serves the stated purpose of maintaining uniform delivered prices at destination whether the furniture moves in its vehicles or in those of for-hire carriers. Supplies and materials are usually purchased f.o.b. origins, although sometimes a freight allowance is made by the supplier. The use of its own vehicles in delivering the furniture is influenced in part by non-availability of for-hire carriage and the need for expeditious deliveries which fosters good will. As appellants concede (page 5 of Jurisdictional Statement), the company does not hold itself out to the general public as a common carrier and its services

are not available to anyone as a contract carrier (48 M.C.C. 259, 260-261).

In the report issued by Division 5 of June 21, 1948, in respect of the Schenley application, it was found that Schenley owns 32 tractor-trailer units employed in delivering one-half of one percent of finished liquor products of its own manufacture to customers in various states, the remainder being shipped by means of rail and motor carriers for hire. Schenley Distillers Corporation purchases the entire output of case liquor of its several subsidiaries which it sells to various purchasers. When delivery of liquor thus sold is transported in Schenley's own vehicles it is sold f.o.b. destination at the origin selling price plus a sum roughly equivalent to the rail rate from origin to destination. This method of recouping the transportation expenses makes the cost of the purchases uniform regardless of the method of transportation used. The remaining shipments are delivered to purchasers by rail and motor carriers at f.o.b. origin prices. On return trips the vehicles are used occasionally for transporting distillery supplies, (which are purchased f.o.b. origin, apparently by individual subsidiaries) at no cost to the subsidiary. No bills of lading are issued and no contract of transportation is made. The applicant does not hold itself out to transport as a common carrier nor are its services available as a contract carrier. The only transportation services rendered are in effecting delivery of liquor of which it is the owner and the occasional delivery of materials to its subsidiaries without charge. (48 M.C.C. 405, 407, 408, 411).

In its report on oral argument, dated November 8, 1949, the entire Commission sustained the holdings of Division 5 that Lenoir (48 M.C.C. 259, 246) and Schenley (48 M.C.C. 405, 411), respectively, are pri-

marily engaged in the sale and distribution of furniture and alcoholic liquors and that the motor operations of each are conducted as a bona fide incident to and in furtherance of their primary businesses and not for the purpose of profiting from the transportation as such (51 M.C.C. 65, 76).

Appellants contended before the Commission, as they did in the District Court, that the Commission erred in holding that Lenoir and Schenley are private carriers, as that term is defined in Section 203 (a) (17) of the Act (49 U.S.C., Sec. 303 (a) (17)), rather than common or contract carriers as those terms are defined in Section 203 (a) (14) and (15) (49 U.S.C., Sec. 203 (a) (14) and (15)),[7] and that in making the determination it was not proper for the Commission to apply the "primary business" or "purpose to profit" test as a criterion or standard for distinguishing between private and for-hire carriage. Further, that it was error for the Court to sustain the Commission's findings, that each of the applicants is a private carrier within the meaning of the Act, on the ground that the motor carrier operations are incidental to its primary noncarrier business, notwithstanding that each receives compensation for the transportation service performed by it.

Appellee submits that this appeal presents no substantial questions. The issue presented is whether a concern engaged in a non-trucking enterprise, including as here a manufacturing or mercantile business, may, without losing its status as a private carrier, directly or indirectly collect compensation for delivering goods to its customers, when such transportation is performed in furtherance of a primary business of manufacture or sale of goods.

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[7] See footnotes 4, 5 and 6, page 3, of this motion, for statutory definitions of these three types of carriers.

Section 203 (a) (17) of the Act (49 U.S.C. 303 (a) (17)) defines a private carrier as "any person not included in the terms 'common carrier . . . or contract carrier' . . . who or which transports . . . property of which such person is the owner, lessee, or bailee, *when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.*" (Emphasis added.)

Upon a consideration of all the facts and circumstances of operations performed by Lenoir and Schenley, the entire Commission, in upholding the prior decisions of Division 5 which had found by the application of the "primary business" test that each concern was a private carrier, restated and reaffirmed that test. The Commission said (51 M.C.C. 65, 75):

> We conclude that the principles announced by the division in the *Woitishek* case [8] are sound and consistent with the act and that, despite the simplicity or complexity of facts in any case, they afford an adequate basis or criteria for the determination of a carrier's status under the act. If the facts establish that the primary business of an operator is the supplying of transportation for compensation then the carrier's status is established though the operator may be the owner, at the time, of the goods transported and may be transporting them for the purpose of sale. Numerous cases involving operations of this character could be cited. If, on the other hand, the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the trans-

[8] For reference to this holding (42 M.C.C. 193), see *infra*, p. 8.

portation performed. In our opinion, they cannot be both. A finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that the motor operations are conducted in bona fide furtherance of its other and primary commercial enterprise.

We do not mean that a private carrier may not under the law realize an incidental profit in the conduct of its motor carriage without forsaking or endangering its private carrier status. As the division stated in the *Woitishek* decision, each case must be determined on its own facts.

Applying the tests heretofore discussed to the facts of record in the considered cases, we conclude that the respective applicants are primarily engaged in the sale and distribution of alcoholic liquors and in manufacture of furniture and the motor operations of each are conducted as a bona fide incident to and in furtherance of their primary businesses and not for the purpose of profiting from the transportation as such.

The Commission has consistently applied the "primary business" of the operator test in determining the status of motor carriers. This test was used in the first case in which the question of carrier status was involved after motor carrier regulation became effective under the Act when the Commission, by Division 5, employed it in *Carpenter Common Carrier Application,* 2 M.C.C. 85 (1937). Since then the Commission has used this test in scores of other cases, sometimes rephrasing it, using different words such as "principal" or "real" or "regular" and "established" business of the operator and occasionally has stated it as whether the transportation "is performed with a purpose to profit from the transportation as such." *Woitishek Common Carrier Application,* 42 M.C.C.

193, 206 (1943).[9] All such statements are only paraphrases or restatements of the "primary business" test. The Supreme Court has held that great weight is to be attributed to the Commission's interpretation of the Act. *United States* v. *American Trucking Asso.*, 310 U.S. 534, 549; *Colgate Palmolive Peet Co.* v. *United States*, 320 U.S. 422, 426; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-89; *Levinson* v. *Spector Motor Co.*, 330 U.S. 649, 672.

The courts, with but a single exception, (*Interstate Commerce Commission* v. *Jamestown Sterling Corp.* (W.D. N.Y.), 64 F. Supp. 121—a decision by a district court as ordinarily constituted of one judge) have upheld the Commission's application of the "primary business" test as the criterion for distinguishing between for-hire and private carriage. *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155 (C.A. 10), cert. denied 317 U.S. 650, 707; *Interstate Commerce Commission* v. *Clayton*, 127 F. 2d 967 (C.A. 10); *Interstate Commerce Commission* v. *Tank Car Oil Corp.*, 151 F. 2d 834 (C.A. 5); and *Beggs* v. *Kroger Co.*, 167 F. 2d 700 (C.A. 8); *Schenley Distillers Corp.* v. *United States*, 61 F. Supp. 981 (Del.), affirmed 326 U.S. 432. In the *Schenley* case, the district court in commenting on the "primary business" test observed that in determining whether carriage is for hire or private carriage, "it was found helpful to determine whether the primary business was the supplying of

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[9] In the *Woitishek* case, after reviewing the authorities at length, the Commission stated (pp. 205-206):

> "After careful reconsideration of the entire subject, we are convinced that we should continue as in the past to determine all issues of for-hire versus private carriage on the basis of the operator's primary business. In so doing, we shall, of course, give appropriate consideration to the fact, when shown, that an operator receives compensation for transportation performed identifiable as such, but we do not think that such fact alone should be allowed to control our decisions. * * *."

transportation or whether the transportation was merely incidental" (61 F. Supp., at p. 981).

The legislative history of the Act supports the Commission's interpretation, that the primary business of the operator is the test to be applied in distinguishing between for-hire and private carriage.[10]

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[10] In the "hearings before the Committee on Interstate Commerce, U. S. Senate, 74th Cong., 1st Session on S. 1629" (Government Printing Office, Washington, 1935), page 86, the late Commissioner Joseph B. Eastman testified as follows in response to questions asked by Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, as to whether the proposed bill to regulate motor carriers would regulate the transportation by owners of goods being transported to their customers:

> Mr. Eastman: Well, I was going to say that in instances where the trucker actually buys the products which he transports, if that is a bona fide transaction and is not merely a device to evade regulation, he would be a private carrier and be carrying his own property and there would not be any regulation of him under this bill. In fact, he would not charge any rates; he would be simply carrying his own property. However, if he is carrying for others, either as a common carrier or as a contract carrier, he would be subject to regulation under this bill. . . .
>
> The Chairman: He would not be exempted, as I understand it, unless he made his living in that particular way."

Representative Holmes, in explaining the effect of regulation proposed in the bill, and after quoting the definition of private carriers as finally enacted in Section 203 (a) (17), gave the following example of such carrier (Vol. 79, Congressional Record—House, Legislative Day July 31, 1935, page 12221):

> "Mr. Holmes: . . . In other words, the department stores in Washington that may sell a bill of goods to be delivered in Philadelphia, New Jersey, or Massachusetts, do not come under the provisions of this bill because they are private owners of motor vehicles.
>
> Mr. Hope: Suppose a department store in Washington owning a fleet of trucks and delivering their own merchandise, should deliver merchandise for another store; would they not be a contract carrier under those circumstances?
>
> Mr. Holmes: No, they are casual operators. They are not in business as common carriers or contract carriers."

The following is from the debate on the bill S. 2009, which later became the Transportation Act of 1940 (Public, 785—76th Cong.—3rd Sess.)—amending the Interstate Commerce Act, including

That Congress knew the Commission was employing the "primary business" test in distinguishing between common and contract carriage on the one hand and private carriage on the other hand, is revealed by reference, in the course of the hearings on the bill which ultimately became the Transportation Act of 1940, to a letter dated April 3, 1939, from Commissioner Eastman (on behalf of the Interstate Commerce Commission) to Representative Lea, Chairman of the House Committee on Interstate and Foreign Commerce.[11]

Of further significance is the fact that Congress amended the original act containing the definitions of

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amendments to the original wording of the common and contract carrier definitions (84 Cong. Rec. 5871, *et seq.*):

> "Mr. McKellar: To use the illustration I gave a while ago, if a private concern in Memphis, Tenn., desires to deliver its goods to the South, in Mississippi, or to the West, in Arkansas, it may do so without coming within the provisions of the bill?
>
> Mr. Wheeler: Exactly. The most attempted to be done—and that has not been done—is to try to regulate the safety conditions. There is a provision in the old law, which remains the same with respect to safety provisions. (84 Cong. Rec., pp. 6052-6053).
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> * * * * *
>
> Mr. Wheeler: I have tried to make it plain to the Senate, not once but 50 times, that, as a matter of fact, there is nothing in the bill which seeks to regulate private carriers, because in my judgment—and some members of the committee have disagreed with me—Congress does not possess the power to do so. If I owned a boat, for instance, and I was carrying my own cargo in it, and the Government said that I had to pay such and such charges for the freight that I carried for myself, it would simply result in my taking money out of one pocket and putting it into the other." (84 Cong. Rec., p. 6127).

[11] At page 6 of this letter, after quoting the private carrier definition, the Commission advised Congress as follows:

> "In that connection, question has arisen as to whether an industrial establishment which delivers its products to customers by its own trucks is a 'private carrier of property', if the price which the customer pays for the products includes an increment to cover the cost of this transportation. This question was considered by Division 5 of the Commission in *Congoleum-Nairn, Inc., Contract Carrier Application*, 2 M.C.C. 237, where a situation of that general character existed. It was

common, contract and private carriers and made certain changes with respect to common and contract carriers, yet left unchanged the private carrier definition. It did this notwithstanding its knowledge that the Commission was employing the primary business test in distinguishing between the three types of carriers.

The practice of private carriers of including in delivered prices an amount equivalent to rail freight rates or otherwise directly or indirectly collecting compensation for transporting their goods was considered by the Congress in the enactment of the Transportation Act of 1940. While the discussion was directed mainly to private carriage by water where the higher railroad rates were applied in fixing delivered prices it was noted that similar practices were observed by private carriers by motor vehicles.[12]

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there found that applicant was 'not engaged in the transportation of property' and that it was 'in no sense a carrier for hire in its motor-vehicle operations', since they were 'conducted by it as an integral part of its business of manufacturing and selling the commodities described.' Applicant was held to be, 'in these motor-vehicle operations, incidental to its principal business * * * a private carrier within the terms of the above definition.'"

Senate 1939 Hearings, page 765, also House Hearings, page 1557, et seq.

[12] In the debate on the bill contained in 84th Congressional Record, page 5951 (Senate), May 23, 1939, the following colloquy occurred:

"Mr. Wheeler * * * I understand that one company ships automobiles and parts through the Panama Canal and up to Los Angeles. They charge for the automobile, however, the Detroit price f.o.b. freight to Los Angeles. * * *.

Mr. McCarran: Mr. President, if I may interrupt, the same thing is true with reference to the caravan system. In other words, the automobile companies run caravans of automobiles across the country, but the purchaser is charged the freight rate."

At page 6137, Congressional Record, 84th Congress, May 25, 1939, Senator Wheeler again referred to this subject, as follows:

"* * * The oil companies ship crude oil by truck into Montana, and claim they can ship it cheaper than by rail,

The Commission considered and rejected appellees' contention that compensation in any form for transportation services provided by a transporter of goods makes him a for-hire carrier subject to regulation under the Act.[13]

Appellants contend, page 14 of their Jurisdictional Statement, that the private carrier definition intended to exclude all other carriers who receive compensation for transportation of property which they own or

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and refine it into gasoline in the State. They produce the crude oil in the oil fields, ship it to the refinery in Montana and turn out gasoline; and what do they charge the consumers in Montana for it? They charge them for gasoline the price in the Oklahoma fields plus the railroad freight rate to Montana, when it is refined in Montana * * *."

In order to prevent the practice of private carriers from delivering their own goods to customers at a delivered price which includes a transportation charge, Senator Shipstead introduced an amendment to the Transportation Act of 1940, which would have the effect of amending the Federal Trade Commission Act, which amendment provided as follows (84th Congressional Record 6122, Senate May 25, 1939):

> "For the purposes of this act it shall be deemed to be an unfair or deceptive act or practice in commerce for any person, partnership, or corporation to so fix the price at point of destination of any goods or commodities transported in commerce, that such price includes a charge for transportation, based upon railroad rates, for any part of the transportation of such goods or commodities which was not conducted by railroad."

This amendment was rejected by the Senate. Still another attempt was made in Congress, when the Transportation Act of 1940 was under consideration, to preclude any carrier (common, contract or private) from transporting goods which it produced, or in which it had any "interest, direct or indirect, legal or equitable, except such articles or commodities as may be necessary or intended for use in the conduct of the carrier business of such carrier." This so-called "Commodities Clause" was considered "far too drastic" and the "subcommittee" to which the measure was referred decided against any change in the existing clause which applied only to railroads. (Senate Report No. 433, 76th Congress, 1st Session, page 16).

[13] "The *Woitishek* decision considered and properly rejected the argument advanced herein, that a finding of for-hire carriage is warranted when the difference between the cost of the article at

transport in furtherance of any commercial enterprise and that it was the intent of Congress to classify all carriers receiving compensation, direct or indirect, as common or contract carriers. Thus, they insist that compensation is the test. This same contention was made before the Commission and the District Court and was rejected by each tribunal. The fallacy of this contention is ably pointed out by the District Court in its opinion.[14]

In the light of the facts in the case at bar, the District Court's holding is amply sustained by the cases cited in its opinion. These authorities, together with the legislative history, also referred to in the opinion, demonstrate that Congress intended the "primary business" test as the criterion for distinguishing be-

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point of origin and the selling price at destination varies in direct proportion to the distance such article is transported. We do not believe that Congress intended that any concern which operates its own motor vehicles in bona fide furtherance of its noncarrier primary business must operate such vehicles without compensation or on a strict recovery of cost basis, or that the cost of transportation furnished should be spread equally over all output by the establishment of a factory price which would in every case include delivery regardless of whether any transportation service was furnished. Even the for-hire carriers recognize that all private carriers must in some manner compensate themselves for or recover the costs of their motor operations, but they contend that the compensation should be included in the over-all costs, which, with a figure for profit, make up the selling price at origin and that all deliveries, regardless of the distance involved, should be accomplished without any addition to the factory or origin price. We see no statutory basis for this argument or for the argument that a private carrier may not conduct motor operations without acquiring a for-hire carrier status unless it be established that such operations are necessary to the conduct of its primary business."

[14] With respect to this contention the Court stated:

> "Counsel for plaintiffs here point out that under the statutory definitions one is a private carrier only if one is 'not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle." This is true, and equally true is it that the term 'compensation' is found only in the statutory definitions of common carrier and contract carrier, not in the definition of private carrier. But it does not follow, as plaintiffs contend, that wherever compensation, direct or indirect,

tween for-hire and private carriage. It is also clear from those authorities and the legislative history that Congress never intended to prohibit a concern which transports in its own trucks, goods sold by it, from directly or indirectly collecting compensation for transporting these goods, or that such a concern was to be considered as a for-hire carrier and subject to regulation, when such transportation is in *bona fide* furtherance of a non-transportation service.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General,
Department of Justice.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

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is found, the carrier is (with only those exceptions made express in the Act) a common carrier or a contract carrier."

Plaintiffs are here attributing to the term 'compensation' a mystical significance which the term does not possess. There are fallacies in this connection even if resort be had, as plaintiffs wish, to mere mechanical logic and a purely analytical interpretation of the terms used in the statutory definitions. Thus, the clause 'when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise' appears (a) in the definition of private carrier, but not (b) in the other two definitions, common carrier and contract carrier. Accordingly, by this same logic, the basic difference between (on the one hand) common carriers and contract carriers and (on the other hand) private carriers, is whether or not the 'transportation is for the purpose of sales, lease, rent or bailment, or in furtherance of any commerical enterprise.' Possibly, this confused thinking of plaintiffs may be due somewhat to the fact that at common law, the common carrier of goods must carry for a compensation. See Dobie, Bailments and Carrier, 296, 300, 304." 93 F. Supp. 517, 524.

We concur in the above motion to dismiss or affirm filed by the United States and the Interstate Commerce Commission.

JOHN S. BURCHMORE,
For National Industrial Traffic League.

WILLIAM A. QUINLAN,
For National Council of Private Motor Truck Owners, Inc.

JOSEPH E. KELLER,
For Private Carriers Conference of American Trucking Associations, Inc.

FATE J. BEAL,
For Lenoir Chair Company.

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